IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 24TH JANUARY 2007 / 4TH MAGHA 1928

Crl.MC.No. 181 of 2007()

AGAINST THE ORDER DATED 16/12/2006 IN CMP 2900/2006 IN CC.654/2005 of JUDL.MAGISTRATE OF FIRST CLASS-I, CHENGANNUR

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PETITIONER: RESPONDENT:

RAVEENDRAN,
KALEEKKAL HOUSE, KUTTIKATTAPADU JUNCTION,
KALLISSERY P.O., CHENGANNUR.

BY ADV. SRI.IYPE JOSEPH
SRI.NINU M.DAS

RESPONDENTS: PETITIONER:

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1. ANIL KUMAR D., RAMA SADANAM,
KARIYANOOR P.O., THOTTAPUZHASSERY,PATHANAMTHITTA,
REP.BY K.G.RAJASEKHARAN NAIR,KANNANKARA VEEDU,
PULLADU MURI,KOIPURAM VILLAGE,THIRUVALLA, NOW REP.
BY NEW P/A HOLDER,UNNIKRISHNAN NAIR,VADASSERIL(H),
NIRANAM MURI,KADAPRA VILLAGE,THIRUVALLA TALUK.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT.LATHA

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 24/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.BASANT, J

Crl.M.C.No.181 of 2007

Dated this the 24th day of January, 2007

ORDER

The petitioner faces indictment in a prosecution under Section 138 of the N.I Act. The complaint is lodged by the 1st respondent, one Anilkumar. At the time when the complaint was filed, he was represented by one Rajasekharan Nair as the holder of his power of attorney. Cognizance was taken. The petitioner entered appearance. The matter was posted for trial. At that stage it would appear that the former power of attorney Rajasekharan Nair did not continue to represent the complainant. When the matter came up for evidence, another person, one Unnikrishnan Nair tendered evidence on behalf of the complainant. That Unnikrishnan Nair in the absence of Rajasekharan Nair has produced a power of attorney before the learned Magistrate. He made a subsequent application that he may be permitted to prosecute the complaint as the power of attorney of the complainant. That application was filed after the said Unnikrishnan Nair was examined as PW1. Trial is progressing. The petitioner/accused has now come to this Court with a prayer to invoke the powers under Section 482 Cr.P.C.

2. What is the grievance ? It would appear that the first grievance is that though Rajasekharan Nair ceased to hold the power

and Unnikrishnan Nair acquired the power, no formal application was filed seeking leave for Unnikrishnan Nair to prosecute the complaint till he was examined as a witness in court. The second contention is that the said Unnikrishnan Nair is not shown in the list of witnesses as a witness, but he has been permitted to be examined on the side of the complainant. The third and the final objection is that when permission was granted later to the said Unnikrishnan Nair to prosecute the complaint, the learned Magistrate had made observations to the effect that such permission will relate back to an earlier date and would justify the prosecution of the complaint by the said Unnikrishnan Nair. These are the grounds of challenge.

3. The complainant was represented by Rajasekharan Nair as power of attorney holder. When Rajasekharan Nair ceased to act as the holder of the power of attorney, the consequence is that the complainant or his agent were not present before court to prosecute the complaint. Of course, Unnikrishnan Nair, the present power of attorney holder was present undisputedly before the court below. I shall assume that the Unnikrishnan Nair's presence should be ignored. Even then, the only consequence is that the learned Magistrate had not dismissed the complaint under Section 256 Cr.P.C. According to me, the learned Magistrate committed no error in not dismissing the complaint under Section 256 Cr.P.C when the

complainant, his agent or the power of attorney holder were not physically present, but the interests of the complainant was looked after by a person-the present power of attorney holder by being present before the court. It is certainly not the law that absence of the complainant must invariably lead to dismissal of the complaint. In these circumstances, the fact that the Rajasekharan Nair or the authorised agent or the complainant were not present on those dates of posting cannot justify this Court invoking the powers under Section 482 Cr.P.C now.

4. The next contention is that Unnikrishnan Nair examined himself as PW1 though he was not cited as a witness. Unnikrishnan Nair's competence to tender evidence must be tested by a cross examination. The omission to cite him as a witness in the witness list and his subsequent examination as a witness for the complainant is not at any rate, sufficient to justify invocation of the powers under Section 482 Cr.P.C. Whether Unnikrishnan Nair, ie.PW1's evidence can be accepted or not will have to be considered and decided by the learned Magistrate while appreciating the evidence of PW1 on the basis of all inputs made available to the learned Magistrate. At any rate, that is no reason to invoke the powers under Section 482 Cr.P.C.

5. The last grievance is that in Annexure-A5, it is mentioned that inference had to be made that Unnikrishnan Nair had the implied

permission to prosecute the case on behalf of the complainant. As a matter of fact, that fact was recognised by the learned Magistrate. Rajasekharan Nair, the earlier agent was not present and Unnikrishnan Nair, the present power of attorney holder was present to prosecute. The learned Magistrate had not earlier dismissed the complaint under Section 256 Cr.P.C. The observation made in Annexure-A5 order is only an explanation as to why the powers under Section 256 Cr.P.C were not invoked earlier. That again cannot be a reason sufficient to invoke the powers under Section 482 Cr.P.C.

6. I do not find any merit in these circumstances in the prayer to invoke the powers under Section 482 Cr.P.C. This Crl.M.C is, in these circumstances, dismissed. I may hasten to observe that dismissal of this Crl.M.C will not in any way fetter the rights of the petitioner to raise the contention that PW1's evidence does not deserve to be accepted by the court. That contention will have to be decided on merits by the learned Magistrate.

(R.BASANT, JUDGE)

rtr/-